Supreme Court, U. S.
FILED
OCT 21 1980
MICHAEL RODAK, JR., CLERK

80-656

No.

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH L. ALIOTO, et al.,
Petitioners.

vs.

JOSEPH B. WILLIAMS, et al., and LEO BAZILE, et al.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED

May an award of attorneys' fees be made in a civil rights action when "mootness" is invoked to preclude appellate review of the trial court judgment?

PARTIES TO THE PROCEEDING

The Petitioners are: Joseph L. Alioto, individually and in his official capacity as Mayor of the City and County of San Francisco; Washington Garner, individually and in his official capacity as Chairman of the San Francisco Police Commission; Marvin Cordoza, individually and in his official capacity as a member of the San Francisco Police Commission; Donald Scott, individually and in his official capacity as Chief of Police, San Francisco Police Department; Charles Barca, individually and in his official capacity as Chief of Inspectors, San Francisco Police Department; and, Mortimer McInerney, individually and in his official capacity as Captain of Inspectors, San Francisco Police Department.

The respondents in this action (originally two actions which were consolidated) are: Joseph B. Williams, Frederick Douglas Haines, Jr., Carlton B. Goodlet, Benjamin Criswell, Hamilton T. Boswell, on behalf of themselves and all other persons similarly situated; and, Leo Bazile, Joseph George, Michael Jones, Charles Lawrence, Prince McGrew, Albert C. Taylor, and all others similarly situated.

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PETITION FOR CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 24, 1980 and amended on August 29, 1980.[1]

[1] See Appendix A.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (No. 78-2965, August 29, 1980) is not yet reported; it is set forth in Appendix A hereto at pages A1 - A9. The orders of the United States District Court for the Northern District of California (Civ. Nos. C-74-866-AJZ and C-74-867-AJZ), are unreported but are set forth in Appendix B hereto at pages B1 - B9. The earlier opinion of the Ninth Circuit concerning the "mootness" herein is reported as *Williams, et al. v. Alioto, et al.*, 549 F.2d 136 (9th Cir. 1977), and is also set forth in Appendix C hereto at pages C1 - C21. The original Findings of Fact and Conclusions of Law together with the Preliminary Injunction issued herein by the District Court are set forth in Appendix D hereto at pages D1 - D14.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 24, 1980, and amended on August 29, 1980. No petitions for rehearing or for rehearing *en banc* were sought, and this petition for certiorari is being filed within 90 days of the July 24, 1980 entry of the original judgment.[2]

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rules 17(c) and 19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. Section 1988 provides as follows:

"Section 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of

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[2] See Appendix A.

this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

Commencing in late 1973, a vicious series of apparently random killings and attempted killings took place on the streets of San Francisco. These incidents have come to be known as the "Zebra" murders. Between December 1973, and April 1974, twelve persons were murdered and six others were wounded in this series of crimes. In each shooting a .32 caliber handgun was the weapon used. All of the victims were Caucasians. All the witnesses' statements declared the killer(s) to be black and male. The shootings all took place in the evening hours, between six and ten p.m., at locations where people were isolated. Several of these shootings occurred at or near Municipal Railway transit stops.

The response of the San Francisco Police Department to this grave assault on public safety and the general terror thereby aroused was to inaugurate a program known as "Operation Zebra." This operation consisted of an intensive investigation and search for the person or persons responsible for these shootings. It was prompted by the fact that the killings were increasing in frequency and the absence of any evidence that the police investigatory techniques previously utilized would lead to the apprehension of the killer(s).

The Operation Zebra search was based on three categories of information: a compilation of physical data believed to describe the killer(s); a summary of the *modus operandi* of the killer(s); and two composite drawings reflecting the actual appearance of the suspects. All this information was derived from witnesses and surviving victums.

A series of orders were issued by the San Francisco Police Department from April 17, through April 25, 1974 embodying information about the Zebra killer(s), as discussed above, and setting forth guidelines to police officers in effecting stops and

conducting pat searches pursuant to this operation. As a result of Operation Zebra, 600 persons were stopped during its seven days duration. So called "Field Identification Cards" were compiled on 181 persons who met the Zebra criteria sufficiently well enough to warrant further investigation as a result of these stops.

Operation Zebra was commenced on April 17, 1974. On April 19, 1974, respondents Joseph B. Williams, et al., applied for a temporary restraining order before the United States District Court for the Northern District of California to stop the operation. The Court denied this motion. However, the Court did issue an Order to Show Cause directing these petitioners to appear on April 24, 1974 to respond to the allegations made by the respondents in their complaint for injunctive relief.

Thereafter, on April 22, 1974, respondents Leo Bazile, et al., also filed a complaint for injunctive and declaratory relief in the United States District Court for the Northern District of California to stop Operation Zebra.

Federal jurisdiction was originally invoked in these matters under the civil rights jurisdiction of the District Court pursuant to 28 U.S.C. Section 1343 and pursuant to the authority of 42 U.S.C. Sections 1981 and 1983, and 28 U.S.C. Sections 2201-2202.

For all intents and purposes the parties and the District Court treated these two actions as consolidated. A two-day trial took place on April 24, and April 25, 1974, at the conclusion of which the court issued its preliminary injunction pursuant to its Findings of Fact and Conclusions of Law.[3]

On April 26, 1974, these petitioners applied for a stay of the preliminary injunction before the District Court. This application was denied. Thereafter, petitioners appealed the

[3] See Appendix D.

decision of the District Court granting the preliminary injunction to the United States Court of Appeals for the Ninth Circuit.

On March 29, 1976, four defendants identified in a State of California Superior Court criminal action as the Zebra killers were convicted and sentenced to lengthy prison terms.[4]

Thereafter, on January 25, 1977, the United States Court of Appeals for the Ninth Circuit dismissed the petitioners' appeal of the District Court's preliminary injunction as "moot" and vacated the judgment of the District Court.[5]

Subsequently, the District Court resumed jurisdiction over the matter and granted an award of forty-five thousand dollars in attorneys' fees to the respondents under 42 U.S.C. Section 1988.[6] Petitioners appealed this decision to the Ninth Circuit. On August 29, 1980, the Court of Appeals filed its amended per curiam opinion and certified said opinion for publication. The Court of Appeals has held that the respondents were "prevailing parties" under 42 U.S.C. Section 1988 on the grounds that they secured a preliminary injunction,[7] notwithstanding the facts that the propriety of that injunction was timely appealed and that the respondents' right to relief, if any, has never been finally established. No permanent injunction ever issued. There has been no settlement. There has been no consent decree. There has been no determination on the merits of the petitioners' timely appeal.

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[4] See *Williams v. Alioto*, 549 F.2d 136 at 142 (9th Cir. 1977).
[5] See Appendix C.
[6] See Appendix B.
[7] See Appendix A.

REASONS FOR GRANTING THE WRIT

I

THERE IS AN IMPORTANT QUESTION OF FEDERAL LAW IN THIS CASE WHICH SHOULD BE DECIDED BY THIS COURT

This case involves an award of attorneys' fees pursuant to 42 U.S.C. Section 1988 wherein the petitioners contend that the respondents are not "prevailing parties" within the meaning of the statute. Review herein by the Supreme Court is sought pursuant to Rule 17(c) on the grounds that the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, or the case below has been decided in a way in conflict with applicable decisions of this Court. The important question of federal law involved in this petition is whether attorneys' fees may be awarded in a civil rights action which is not settled (and in which no consent decree has been issued) when a timely appeal has been held to be moot due to a change in factual conditions and therefore no decision is rendered on the merits of the appeal.

This question is important because exposure to liability for costs (including attorneys' fees) inflicts the same financial harm, and has the same chilling effect on individuals charged with protecting the public interest, as has exposure to financial liability following a judgment on the merits. Such financial jeopardy, and the attendant reluctance of public officials to do their duty, should not be incurred where public officials have acted lawfully and out of necessity. Certainly, to expose any defendant to such costs without a meaningful right to appeal is contrary to all notions of fair play and due process. Congress cannot have intended this result. In this petition it is respectfully urged that the Ninth Circuit has misread this Court's analysis of 42 U.S.C. Section 1988. It is therefore necessary for this Court to rule upon the application of this attorneys' fees

section in actions such as the present one where the doctrine of mootness has intervened to deprive litigants of their right to appeal adverse and improper holdings of the District Courts.

II

THIS COURT HAS NOT HERETOFORE DETERMINED THE APPLICABILITY OF 42 U.S.C. SECTION 1988 IN CASES INVOLVING MOOTNESS ON APPEAL

The rationale of the Ninth Circuit in finding the respondents herein to be "prevailing parties" is based chiefly upon this Court's holdings in two recent cases: *Hanrahan v. Hampton,* ____U.S.____, 100 S. Ct. 1987 (1980); and *Maher v. Gagne,* ____U.S.____, 100 S. Ct. 2570 (1980).[8] Reliance upon these decisions in this case is inappropriate in that they do not involve the same, or even similar, issues as are at stake here.

Specifically, *Hanrahan, supra,* was a case in which this Court disallowed an award of attorneys' fees which had been made after certain criminal defendants successfully sought reversal of directed verdicts against them and also secured the reversal of certain discovery orders. Although it is true, as the Ninth Circuit points out, that a party need prevail only "on the merits of at least some of [their] claims" to be a "prevailing party" for purposes of 42 U.S.C. Section 1988,[9] it is also true that the context in which this is said in the *Hanrahan* opinion, *supra,* at 100 S. Ct. 1989 is that: ". . . [I]t seems clearly to have been the intent of Congress to permit such an interlocutory award to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." Continuing, the Court also says: " . . . Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the

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[8] See Appendix A at pages A3 and A4.

[9] See Appendix A at page A3.

substantial rights of the parties, which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." [footnote omitted] This Court then reversed the award of attorneys' fees in the *Hanrahan* case.

Clearly, in the instant case there has been no determination of the "substantial rights of the parties." Here, the District Court issued a preliminary injunction, which decision was timely appealed. The Ninth Circuit ruled the issues raised by the complaint and appeal to be moot and vacated the action of the District Court.[10]

In the present case the inescapable fact is that the appellate court made only one determination: there were no substantial rights before it to adjudicate. Therefore, the only result in this case consistent with the reasoning of *Hanrahan, supra,* is that there is no basis for an award of attorneys' fees. It must accordingly be said that the *Hanrahan* case is not authority for an award of attorneys' fees in a case which is held to be moot on appeal.

Likewise, the case of *Maher v. Gagne, supra,* provides no authority for determining this action. *Maher, supra,* stands for the proposition that a party may, by a consensual agreement or settlement, sufficiently achieve the ends of his litigation to be considered a "prevailing party" under 42 U.S.C. Section 1988. The petitioners do not dispute this proposition. However, there is absolutely nothing consensual about a trial court judgment which is properly appealed. There has been no determination that these petitioners are incorrect in their claim that they acted properly and within the law in all matters material to this action. To allow them, on these facts, to suffer the imposition of

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[10] See Appendix C.

costs (attorneys' fees) is tantamount to a declaration that the mere fact of the filing of the original lawsuit itself is more important than the legal merits of the suit. The absurdity and injustice of such a result must be evident to all.

Although the Ninth Circuit has said in this case that the respondents "did obtain a judicial determination that [the petitioners] had acted unconstitutionally,"[11] the petitioners respectfully, but forcefully, disagree. The ultimate result of the petitioners' appeal to the Ninth Circuit was the vacating of the "determination that [they] had acted unconstitutionally" and mere silence on all other issues.[12]

Therefore, petitioners find no similarity or guiding principle in the *Maher* case, *supra* which authorizes or sustains the judgment below in this matter.

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[11] See Appendix A at page A4.

[12] See Appendix C.

III

CONCLUSION

Neither counsel for the respondents in their pleadings below, nor the United States Court of Appeals for the Ninth Circuit in its opinion herein, have been able to predicate or justify the award of forty-five thousand dollars in attorneys' fees in this case by citation of authority from this Court. This important question is truly one of first impression in the Supreme Court. Petitioners urge this Court to consider the question and declare a rule of law for the guidance of all federal courts in the implementation of the provisions of 42 U.S.C. Section 1988 and to prevent injustice in this case.

DATED: October 16, 1980.

Respectfully submitted,

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Appendices

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH B. WILLIAMS AND LEO BAZILE, et al., *Plaintiffs-Appellees,*	No. 78-2965
vs.	D.C. Nos. C-74-866-AJZ
JOSEPH L. ALIOTO, et al., *Defendants-Appellants*	C-74-867-AJZ

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA HONORABLE ALFONSO J. ZIRPOLI, PRESIDING
ARGUED AND SUBMITTED JULY 8, 1980.
Before: WRIGHT, KENNEDY and HUG, Circuit Judges.

Per Curiam:

This is an appeal from a judgment of the district court awarding attorneys' fees to the appellees as prevailing parties in their civil rights action against officials of the City of San Francisco and officials of the Police Department. The appellees in two consolidated actions challenged police practices, which occurred from April 17, 1974 to April 25, 1974, known as "Operation Zebra." A series of unsolved murders had occurred in San Francisco, and the San Francisco Police Department

initiated a special investigative procedure known as "Operation Zebra" to attempt to identify and capture the killer or killers. Police directives and memoranda authorized officers to stop and frisk black males resembling two composite drawings and having described physical characteristics, with no other indication that they had engaged in or were engaging in criminal activity. Over 600 persons were stopped and "pat searched" in the course of the operation.

The plaintiffs in the two actions sought declaratory and injunctive relief on behalf of black male persons who had been stopped, or were subject to being stopped, pursuant to the "Operation Zebra" practices. After an evidentiary hearing the district court entered findings of fact and conclusions of law and issued a preliminary injunction against the practices. One of the conclusions of law was that the plaintiffs were entitled to reasonable attorneys' fees.

The police officials appealed the preliminary injunction. Before the appeal was heard, four persons were identified as the "Zebra" killers and were convicted and sentenced. The police investigation of the "Zebra" killings ceased; consequently, this court dismissed the appeal as moot and vacated the preliminary injunction, *Williams v. Alioto,* 549 F.2d 136 (9th Cir. 1977). A more complete statement of the facts is set forth in that opinion.

The appellees moved the district court to set the amount of the attorneys' fees. The district court reviewed the detailed affidavits submitted by plaintiffs' attorneys and heard arguments from all parties. The district court entered in order awarding $25,000 to the Bazile attorneys and $20,000 to the Williams attorneys, with a recitation of findings supporting the award. Judgment was thereafter entered on the award.

I

Appellants argue that because this court dismissed as moot the appeal from the grant of the preliminary injunction, the

appellees were not "prevailing parties" under the Civil Rights Attorney's Fees Act of 1976 (the "Act"), 42 U.S.C. Section 1988. We conclude that by obtaining the preliminary injunction appellees "prevailed on the merits of at least some of [their] claims." *Hanrahan v. Hampton,* 48 U.S.L.W. 3780, 3781 (June 2, 1980)(per curiam). The preliminary injunction prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought. Appellees succeeded on a "significant issue in litigation which achieve[d] . . . the benefit the parties sought in bringing suit." *Sethy v. Alameda County Water District,* 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied,* 100 S.Ct. 734 (1980). *See also Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978). Our previous dismissal of the appeal as moot and vacation of the district court judgment does not affect the fact that for the pertinent time period appellees obtained the desired relief, upon findings by the district court that the original guidelines were unconstitutional.

Fee awards are authorized in cases where a party prevails through a settlement rather than by litigation:

> Nothing in the language of Section 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated.

Maher v. Gagne, 40 CCH S.Ct. Bull. P. B3605, B3613 (June 25, 1980). In the present case there is even more reason to award attorneys' fees, where appellees did obtain a judicial determination that appellants had acted unconstitutionally.

II

Appellants contend that because they enjoy good faith immunity in an action for damages, they should likewise be protected against an award of attorneys' fees in the absence of

bad faith. Because appellants were sued in their official capacities, their good faith does not bar an award of attorneys' fees, as it would were the award to be paid by officials. *See Universal Amusement Co. v. Hofheinz,* 616 F.2d 202, 204 n.1 (5th Cir. 1980); *Nadeau v. Helgemoe,* 581 F.2d at 280; *Pickett v. Milam,* 579 F.2d 1118, 1120-21 (8th Cir. 1978).

III

The appellants argue that an award of attorneys' fees against them in their official capacities which will be paid by the municipality cannot be made because the City of San Francisco was not named as a party. At the time this suit was brought the City of San Francisco was not considered a proper party under *Monroe v. Pape,* 563 U.S. 167 (1961).[1] However, the Court held in *Hutto v. Finney,* 437 U.S. 678, 699 (1978), that although the appellants were unable to sue a governmental entity by name, the suit against the governmental officers in their official capacities permitted an award of attorneys' fees to be paid by the governmental entity.[2]

IV

The district court retained jurisdiction to award costs. The original appeal being from an interlocutory order, the district court retained jurisdiction to continue with other phases of the case. *See DePinto v. Provident Security Life Insurance Co.* 374 F.2d 50, 51 n.2 (9th Cir. 1967). In addition, attorneys' fees under section 1988 are awarded as an item of costs, *see Hutto v. Finney,* 437 U.S. at 695, and thus "will ordinarily be sought only after litigation." *Knighton v. Watkins,* 616 F.2d 795, 797 (5th Cir. 1980). We dismissed only the appeal as moot in our prior decision, not the entire action. Appellees were therefore free to apply for attorneys' fees in the district court. *See Crowell v. Mader,* 62 L.Ed. 2d 701, 703 (1980).

The district court awarded the fees in the present case as part of its original order, with the amount to be set later.

Claims for attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot. *See Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1140 (9th Cir. 1979); *Schmidt v. Zazzara*, 544 F.2d 412, 414-15 (9th Cir. 1976).

V

The appeal from the grant of the preliminary injunction was before this court when the Act was passed in 1976. The Act applies to all cases pending on the date of its enactment. Cases on appeal on the date of enactment are pending for purposes of fee awards, *see Hutto v. Finney*, 437, U.S. at 694-95 n.23; *Sethy v. Alameda County Water District*, 602 F.2d at 897; *Molina v. Richardson*, 578 F.2d 846, 854 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978), thus the award of fees under authority of the Act in this case is proper.

VI

Considering all the circumstances of this case, we reject appellants' contention that a full evidentiary hearing was required on the motion to set fees. Appellants were notified on July 5, 1977, that the court intended to award fees. On October 21, 1977, appellants entered a stipulation that argument on the motion be continued from November 7, 1977, to November 21, 1977, and that appellants would not request further factual information from appellees, although further factual findings by the district court could be requested. On November 10, 1977, appellants requested a continuance and permission to conduct further discovery. In view of the stipulation and the lateness of this request, the district court did not abuse its discretion in relying on the submitted affidavits and oral arguments in setting the fee awards.

The affidavits before the court were sufficiently detailed to enable the court to consider all the factors necessary in setting

the fees. *See* Fed. R. Civ. P. 43(e); *Dennis v. Chang,* 611 F.2d 1302, 1308-09 (9th Cir. 1980). Some of the arguments presented by appellants on appeal were argued to the district court and considered by it in making the award. *See Id.* As to those factors, a full evidentiary hearing would have added little. With respect to the other claims we note that appellants requested either further briefing or an evidentiary hearing. Again, in light of the lateness of the request, the district court properly denied the request and relied on the arguments presented in appellants' motion and at oral argument. We note that after consideration of the affidavits and argument the district court did substantially reduce the amount of fees requested by appellees.

The district court adequately considered the requisite factors as set forth by this court in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976), in setting the amount of the fees, and we find no abuse of discretion. *See Id.* at 69. Cf., *Ellis v. Cassidy,* Nos. 79-4160, 78-2483 and 77-4009, slip op. at 3852 (9th Cir. June 20, 1980) (remand proper where district court fails to consider *Kerr* factors). The most important factors relied upon by the district court in setting the amount in the present case are factors we have cited approvingly in determining awards under section 1988. *See Dennis v. Chang,* 611 F.2d at 1308.

Finally, we reject appellants' contention that the court should have differentiated between persons actively involved in the "Operation Zebra" program and others sued only because of their official title. As the court made clear in *Hutto v. Finney,* the present injunctive suit was, for all practical purposes, brought against the City of San Francisco. Because the award is against the appellants in their official capacities it will be paid by the City. *See Hutto v. Finney,* 437 U.S. at 699-700; *Pickett v. Milam,* 579 F.2d at 1121 n.4. There is therefore no need to make such a determination.[3]

We affirm the order of the district court awarding the attorneys' fees against the appellants in their official capacity.

Appellees are also entitled to a reasonable fee for their services on this appeal. We deem it appropriate to remand to the district court for a determination of the time spent, and fees to be awarded, on this appeal.

AFFIRMED.

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[1] The Court has since recognized municipalities as "persons" that may be sued under Section 1983. *See Monnell v. New York City Department of Social Services,* 436 U.S. 658 (1978).

[2] Appellants argued at oral argument that the rationale of *Owen v. City of Independence,* 48 U.S.L.W. 4389 (April 14, 1980), precluded an award of attorneys' fees against the individual defendants unless bad faith was proved. However, the Court in *Owen* holds that the good faith of the officers is not defense to the liability of the city as it is to the liability of the individuals in their individual capacity. An award of attorneys' fees in this case, which is to be paid by the city, not the individuals, is consistent with *Owen.*

[3] We note that appellees have not identified any one of the named defendants as not being involved in some way in the operation.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEO BAZILE, et al., *Plaintiffs,*	No. C-74-0867 AJZ and No. C-74-0866 AJZ **Consolidated Actions**
vs.	
JOSEPH L. ALIOTO, et al., *Defendants.*	

ORDER AWARDING ATTORNEY'S FEES

This matter having come before the court pursuant to motion regularly filed, the court having considered the briefs submitted by the parties and heard the arguments of counsel, the court finds as follows:

1. When the preliminary injunction was entered in this case on April 25, 1974, the court indicated in the findings and conclusions that "this is an appropriate case for the award of reasonable attorney's fees, to be fixed by this Court upon application of Plaintiffs."

2. Since the preliminary injunction was entered, the Supreme Court decided *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240 (1975), the instant case was appealed to the United States Court of Appeals, and Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, as reflected in 42 U.S.C. Section 1988.

3. The Ninth Circuit Court of Appeals, in a decision dated January 25, 1977, and by way of mandate filed in this court March 4, 1977, ordered that the appeal of the instant case was

dismissed (as moot) and that the judgment of the district court was vacated.

4. Since the opinion and mandate of the court of appeals leave in doubt the question whether this court has any continuing jurisdiction to award attorney's fees, the mandate must be read in conjunction with the opinion of the court of appeals. *See, Ogden v. United States,* 323 F.2d 818, 822 (9th Cir. 1963).

5. The mandate of the court of appeals and the opinion of that court address only the "judgment of the district court" (which made no mention of attorney's fees) and dismiss the *appeal.* This court concludes, therefore, that the opinion and mandate of the court of appeals do not deprive this court of continuing jurisdiction to award attorney's fees.

6. The instant case can be said to have been "pending" at the time the Civil Rights Attorney's Fees Awards Act of 1976 was passed. *Stanford Daily v. Zurcher,* No. 74-3212 (9th Cir., Feb. 2, 1977). Moreover, the plaintiffs herein may be said to have "prevailed" within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976 in that the litigation served "as a catalyst to effect change and thereby [achieved] a valuable public service," thereby making appropriate an award of fees "even though the suit never [proceeded] to a successful conclusion on the merits." *Wilderness Society v. Morton,* 495 F.2d 1026, 1034 (D.C. Cir. 1974) (en banc), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975); see also S. Rep. No. 94-1011, Cong., 2d Sess. 5 (1976); H.R. Rep. No. 94-1558, 2d Sess. 7-8 (1976).

7. Plaintiffs are entitled to an award of reasonable attorney's fees in connection with all district court proceedings, pursuant to the provisions of the Civil Rights Attorney's Fees Awards Act of 1976.

In accordance with the above-enumerated findings, IT IS THEREFORE ORDERED as follows:

1. Judgment shall be entered dismissing this action;

2. Plaintiffs' attorneys are entitled to reasonable attorney's fees in connection with:

a. all aspects of the proceedings in this court culminating in entry of the preliminary injunction;

b. all aspects of the proceedings in this court leading to modification of the preliminary injunction;

c. all other aspects of the proceedings in this court related to an award of reasonable attorney's fees.

3. The parties are directed to attempt to reach an agreement within 30 days of the date of this order with regard to the amount of the costs and fees to be awarded;

4. If the parties fail to agree within 30 days, plaintiffs may apply to this court for an order fixing the amount of the fees; and

5. This court retains jurisdiction to determine that costs and reasonable attorney's fees are paid in accordance with the orders of the court.

Dated: July 5, 1977

/s/ ALFONSO J. ZIRPOLI
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEO BAZILE, et al.,
Plaintiffs,

vs.

JOSEPH L. ALIOTO, et al.,
Defendants.

JOSEPH B. WILLIAMS, et al.,
Plaintiffs,

vs.

JOSEPH L. ALIOTO, et al.,
Defendants.

ORDER FIXING THE AMOUNT OF ATTORNEY'S FEES

Plaintiffs' motion for an order fixing the amount of reasonable attorney's fees for all aspects of the District Court proceedings in this matter came on regularly for hearing on November 21, 1977, after the parties failed to agree upon a settlement of the fee amount to be awarded.

The court has considered the briefs of all parties, plaintiffs' attorneys' affidavits, the files and records of the court, the court's own observation of the conduct of this litigation by

plaintiffs' counsel, and having heard argument in connection with the fee amount to be awarded, the court finds as follows:

1. Eight attorneys for plaintiffs Leo Bazile *et al.* have sought to share in the fee award in the *Bazile* case. The fees awarded to the *Bazile* attorneys will be donated by counsel to the Northern California Police Practices Project. The eight attorneys are Amitai Schwartz, Anthony G. Amsterdam, Jerome B. Falk, Jr., Stanley J. Friedman, Paul Halvonik, Lowell Johnston, Joseph Remcho, and Cecil Poole.

2. Four attorneys for plaintiffs Joseph B. Williams, *et al.* have sought to share in the fee award in the *Williams* case. The fees awarded will be divided among the four attorneys, Benjamin James, Jr., Cecil McGriff, Garfield Steward, and Nathaniel Cooley.

3. The court has wide discretion in fixing the fee amount to be awarded, and relies upon the decision in *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974) *aff'd* 550 F.2d 464 (9th Cir. 1977), *cert. granted* 46 L.W. 3182 (U.S., October 3, 1977) as its principal guide in exercising its discretion in this case.

4. The court has considered the amount of time reasonably devoted by plaintiffs' attorneys to the litigation; the value of the time in light of the experience, reputation and ability of each set of plaintiffs' attorneys; the quality of the attorneys' presentation, and the important constitutional rights that were vindicated in these cases. These factors have been considered in connection with the court's opportunity to view the attorneys' work during the course of the litigation and the information provided by the parties.

5. Some of the hours expended by both sets of attorneys is unreasonable in light of the issues presented, but the court believes it is appropriate to treat each set of attorneys separately for purposes of the fee award, and to balance necessary and unnecessary hours in computing an average overall hourly rate

in order to reach a fee amount which is reasonable. The court recognizes that defendants had numerous attorneys assigned to this case, including members of the San Francisco Police Department's Legal Office.

6. The court has also considered the customary fee for similar work, recognizing that $50 per hour was awarded in the *Stanford Daily* case in 1974, for time devoted in 1971, 1972, and 1973, an amount which defendants concede would be appropriate.

7. The attorneys in the *Bazile* case have claimed 460.25 hours. The court believes that some of the hours claimed were unnecessary, but that an average hourly rate of approximately $50 is a reasonable rate which balances all of the factors, including the fact that some hours were unnecessary, and that some attorneys could command a higher rate than others. The court further believes that $2,000 is an appropriate premium which takes into account the contingent nature of the compensation and the quality of the attorneys' work. The total sum of $25,000 is reasonable.

8. The attorneys in the *Williams* case have claimed 431.5 hours. The court believes that some of the hours claimed were unnecessary, but that an average overall hourly rate of approximately $45 is a reasonable rate which balances all of the factors, including the fact that some hours were unnecessary, and that some attorneys could command a higher rate than others. The court further believes that $1,000 is an appropriate premium. The total sum of $20,000 is reasonable.

In accordance with the above enumerated findings, IT IS THEREFORE ORDERED as follows:

1. Plaintiffs' counsel in *Bazile v. Alioto,* No. C-74-0867 AJZ, shall recover from defendants the sum of $25,000 as reasonable attorneys' fees for all aspects of the District Court proceedings in this litigation, to be donated to the Northern California Police Practices Project.

2. Plaintiffs' counsel in *Williams v. Alioto,* No. C-74-0866 AJZ, shall recover the sum of $20,000 as reasonable attorneys' fees for all aspects of District Court proceedings in this litigation, to be divided among the attorneys who submitted affidavits to the court.

/s/ ALFONSO J. ZIRPOLI
United States District Judge

DATED: 4-17-78

APPENDIX C

No. 74-2149

United States Court of Appeals

FOR THE NINTH CIRCUIT

Jan. 25, 1977

JOSEPH B. WILLIAMS AND LEO BAZILLE (sic), et al.,
Plaintiffs-Appellees,

vs.

JOSEPH L. ALIOTO, et al.,
Defendants-Appellants.

An order of the District Court of the Northern District of California, Alfonso J. Zirpoli, J., preliminarily enjoined officials of a municipal police department from continuing certain practices of "Operation Zebra," a program involving stopping, frisking, and questioning black males. Defendants appealed. The Court of Appeals, Trask, Circuit Judge, held that, by reason of convictions and cessation of the homicides, the appeal was moot.

Appeal dismissed, and judgment of the District Court vacated.

Before TRASK and GOODWIN, Circuit Judges, and BOHANON, * District Judge.

* The Honorable Luther Bohanon, Senior United States District Judge for the Northern, Western and Eastern District of Oklahoma, sitting by designation.

TRASK, Circuit Judge:

This is an appeal from an order of the district court of the Northern District of California that preliminarily enjoined officials of the San Francisco Police Department from continuing certain practices of "Operation Zebra," a program involving the stopping, frisking, and questioning of black males who resembled an unapprehended murderer. Jurisdiction to hear this appeal is based upon 28 U.S.C. Sections 1291, 1292(a)(1). Because there is no longer a case or controversy under Article III of the Constitution, we dismiss the appeal as moot and vacate the judgment of the district court.

I

Between December 1973 and April 1974, a series of unsolved murders and attempted murders terrorized the City of San Francisco. All 17 victims were white; witnesses and surviving victims described the assailant or assailants as black, male, and 20 to 30 years of age. No apparent motive existed for the shootings, which occurred during the evening hours at various locations in the City.[1] According to the statements of some city officials, tensions were developing that created a danger of racial conflict and violence.

The San Francisco Police Department initiated a special investigation of the crimes, assigning the letter "Z" and the code name "Zebra" to the shootings. Because of the failure of traditional, although intensified, law enforcement techniques to

[1] For convenience, this opinion generally will discuss the murderer or murderers in the singular. During the investigation, law enforcement officials did not know how many people were responsible for the shootings. At times, police officials referred to one killer, but on other occasions they discussed several assailants. On March 29, 1976, four persons were convicted of these crimes after a jury trial in the Superior Court of the County of San Francisco, California. *People v. Moore,* No. 88244 (Super. Ct. Cal. 1976).

apprehend the murderer, the Department decided to implement a saturation campaign designed to identify and capture the killer. On April 17, 1974, Captain Taylor issued an intradepartmental memorandum describing the nature of "Operation Zebra." All officers on patrol were authorized to "stop those persons who fit the description of the suspects, making a pat search of their person for possible weapons, [after which] a Field Interrogation Card shall be completed." Plaintiffs' Exhibit No. 1. The description or "profile" consisted of two parts. First, two composite sketches of the suspect prepared from eyewitness descriptions were included in the profile. Second, Taylor's directive supplemented these drawings with a general description of the "Zebra killer" and his *modus operandi:*

> "These murders have been committed by:
>
> One or two Black males
>
> 20 to 30 years old
>
> 5 foot 8 to 6 foot
>
> Slender to medium build
>
> On foot or in a passenger vehicle
>
> Armed with a 32 ca. automatic between the hours of 2000 to 2300." *Id.*

The directive did not indicate that the officers were expected to consider a person's behavior as a factor in deciding whether to stop him.

During the period from April 18, 1974, to April 23, 1974, police officials issued several more directives relating to Operation Zebra. An April 18 verbal order by Captain Barca to a special Operation Zebra detail and two written orders from Police Chief Scott, dated April 19 and April 22, created some confusion over whether the Operation Zebra frisks were mandatory or discretionary. All three orders indicated that stops could continue being made on the sole basis of resemblance to the profile, however. An April 23 memorandum from Barca to the special Zebra Command stated:

> "From now on, be more selective when making stops. Make them when the individual [not only resembles the profile but] is acting, or appears to be, out of the ordinary." Plaintiffs' Exhibit No. 7.

No evidence indicates that this directive applied to ordinary patrol officers, a much larger group.

On April 25, 1974, Chief Scott issued another order, the "Revised Zebra Guidelines," directed to the entire Police Department and superseding prior oral and written instructions. With some additions, the revised guidelines, like earlier memoranda, contained a list of the suspect's physical characteristics and modus operandi, and referred officers to the composite drawings of the killer. The guidelines also contained detailed provisions regulating the nature of contacts, stops, police conduct during stops, frisks, and frisk procedures. In its section on stops, the guidelines provided a "list [containing] . . . some factors which—alone or in combination—may be sufficient to establish 'reasonable suspicion' for a stop." Defendants' Exhibit E at 3 (emphasis in original). These factors included, inter alia, the suspect's appearance ("Does he generally fit the description of the person wanted for the particular offense being investigated?"), the time of day and area of the stop, the officer's prior knowledge and source of information about the suspect, and the suspect's pattern of conduct ("Does the person's conduct resemble the pattern of conduct of *modus operandi* followed in the Zebra assaults?"). *Id.* at 3-4. The guidelines cautioned that an officer could make a stop only on the basis of specific, articulable facts which justified him in believing that a crime had been committed by the person stopped.[2]

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[2] In pertinent part, the guidelines stated:

> "Basis for a Stop. If an officer reasonably suspects that a person has committed, is committing, or is about to commit any crime, he has the authority to stop that person.

(footnote continued)

The guidelines stated that frisks were discretionary: "A law enforcement officer may frisk any person whom he has stopped when the officer reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself or others." Defendants' Exhibit E at 5-6. Factors which alone or in combination justified a frisk included the person's appearance ("Do his clothes bulge in a manner suggesting the presence of an object capable of inflicting injury?"), his actions, the officer's prior knowledge about the suspect, and the time of day and location of the stop. *Id.* at 6. The guidelines did not indicate that a frisk could be made on the sole basis of the suspect's resemblance to the composite drawings.

On April 19, 1974, and April 22, 1974, several days before the issuance of the revised guidelines, plaintiffs brought class actions seeking declaratory and injunctive relief from alleged Fourth Amendment violations of the Zebra program. They brought the actions on behalf of all black males who were stopped or subject to being stopped pursuant to the directives. For purposes of an evidentiary hearing and a ruling on the motions for declaratory and injunctive relief, the court consolidated the cases.

(footnote continued from previous page)

> He may exercise this authority in any place that he has a right to be. Both pedestrians and persons in vehicles may be stopped.
>
> "Reasonable Suspicion. The term 'reasonable suspicion' is not capable of precise definition; it is more than a hunch or mere speculation on the part of an officer, but less than the probable cause necessary for arrest. It may arise out of a contact, or it may exist prior to or independently of a contact. Reasonable suspicion has been defined as a combination of specific and articulable facts, together with reasonable inferences from those facts, which in light of the officer's experience, reasonably justify believing that the person to be stopped had committed, was committing, or was about to commit a crime."

On April 25, 1974, shortly after the promulgation of the revised guidelines, the district court ended its evidentiary hearing, entered its findings of fact and conclusions of law, and issued a preliminary injunction. In its findings of fact, the court stated that the directives and memoranda issued between April 17, 1974, and April 22, 1974, were similar in their authorization "that officers stop black male individuals physically resembling two composite drawings . . . and having other general physical characteristics [described in the directives], although such individuals exhibited no other characteristics or activites that could lead a reasonable officer to believe that the particular individual had engaged in or was presently engaging in criminal activity." C.T. at 91-92.[3] As to the April 25 revised guidelines, the court found that, despite their detailed provisions regulating stopping and frisking, they continued to "authorize a forcible stop on no more than a determination that the subject 'fit[s] the description of the persons wanted' for the Zebra slayings . . . ." C.T. at 93. The court also observed that in the eight day period from April 17 to April 25, over 600 black males were stopped pursuant to Operation Zebra.

The court concluded that "[t]he forcible stoppings of individuals [pursuant to both the original Zebra directives and their successive modifications] upon the ground of resemblance to the suspect . . . and portrayed in the composite drawings . . . without additional reliable evidence which, judged objectively, presents sufficient indicia of reliability to warrant a reasonable police officer in concluding that the particular individual stopped has committed or is committing a criminal offense, violates the Fourth and Fourteenth Amendments to the Constitution of the United States." C.T. at 95. It also held that the revised guidelines of April 25, "to the extent that they continue

[3] The court noted that the April 23 directive to the Zebra Command limiting "the class of persons subject to stop to an individual who 'is acting, or appears to be, out of the ordinary,' " had not been issued to the larger number of ordinary patrol officers, who continued to operate under the prior instructions. C.T. at 92.

to authorize and direct the forcible stop of large numbers of black male persons who fit the general description contained therein and in the aforesaid composite drawings without additional reliable evidence" giving a police officer reasonable suspicion to conclude that an individual has committed a crime, were unconstitutional. *Id.* The court held that the pat-down searches were unconstitutional because "the stoppings are unconstitutional . . . and . . . the pat-down searches are made without reasonable grounds to believe that the particular person patted down is armed and dangerous." *Id.* (citations omitted.)

The preliminary injunction enjoined the San Francisco Police Department from "[f]orcibly stopping on the street any person on the ground that such person appears to be within the so-called 'profile' of the suspected 'Zebra' killer unless other independent evidence (such as the conduct of the suspect) known to the officer create a reasonable suspicion that such person had committed or is committing a crime." C.T. at 100. It also enjoined pat-searching and the preparation of field interrogation cards in the absence of similar independent evidence.

On April 26, 1974, after the district court denied their motion for a stay of the injunction pending appeal, defendants filed a notice of appeal to this court. The substantive issue on appeal is whether Operation Zebra violated the Fourth Amendment prohibition against unreasonable searches and seizures. As a threshold matter, however, we must determine whether this issue is moot.

[1,2] The Supreme Court has stated that the duty of a federal court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). The inability of federal courts "to

review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969).[4]

Two events have raised the possibility that the appeal in the present case is moot. On April 25, 1974, shortly before the issuance of the injunction, the San Francisco Police Department promulgated "Revised Zebra Guidelines" which appellants contend corrected any constitutional infirmities in the earlier directives. Some testimony by Police Chief Scott suggested that, in addition to similarity to the profile and the physical data range, the April 25 directives required officers to have independent evidence of other conduct before they could make an

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[4] The requirement of a "case or controversy" applies to an action for declaratory and injunctive relief, as does the "repetition/evasion" exception to the mootness doctrine, discussed infra. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1964, 40 L.Ed. 2d 1 (1974); 28 U.S.C. Section 2201.

Operation Zebra stop.[5] Appellants argue that this additional requirement gave police officers reasonable suspicion for Fourth Amendment purposes when they stopped citizens.

Similarly, during the hearing the court suggested that the revised guidelines of April 25 were more restrictive than the preliminary injunction proposed initially by appellees.[6] This

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[5] Police Chief Scott testified:

"THE COURT: Are you telling us that in addition to the profile and the resemblance of the individual to the profile, that in order to stop now, you are asking the officers to have independent evidence of other conduct?

"THE WITNESS: Yes, sir, I would say that something extra, something else—right." R.T. at 240. During cross-examination, Scott stated:

"Q. Let me ask you this, Chief. Did you intend by these revised guidelines to do anything new or different in your search for the Zebra killer?

"A. Yes, I would say that my intention would be to probably have the men have a little more substance or reason for making stops in this particular Zebra case. In other words, just as Chief Barca promulgated his order, when we make stops, we want to have a little bit more than just the composite picture, the profile. And I see nothing wrong with it." R.T. at 259.

[6] During a discussion with the City Attorney, the court stated:

"THE COURT: I have before me the proposed preliminary injunction, I have just read these proposed guidelines. I find that from the point of view of the police and law enforcement, these proposed provisions of the preliminary injunction appear to be even more liberal than the guidelines. The only thing wrong with the guidelines is the fact that they use the word 'Zebra.' Now, just reflect on this proposed preliminary injunction. This proposed preliminary injunction is restricted to forcible stopping, forcibly stopping. Now, don't you think that we could reflect upon this for a moment and we could come to an understanding? Wouldn't the City Attorney be better off if he were to consent to the entry of this particular preliminary

(footnote continued)

evidence supports the argument that by April 25, 1974, the Police Department voluntarily had remedied any constitutional defects in its behavior, and that, since questions no longer existed about the constitutionality of the Zebra program, the district court issued an injunction in a controversy that had ended.

Even more important, on March 29, 1976, four defendants identified in a State of California Superior Court criminal action as the Zebra killers were convicted and sentenced to lengthy prison terms.[7] No information suggests that the Police Depart-

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> injunction, in light of the guidelines that have now been submitted? These guidelines, in my view, constitute a possibly greater encroachment than the preliminary injunction is.
>
> "MR. O'CONNOR: If I may respond, Your Honor?
>
> "THE COURT: I mean, these guidelines constitute a lesser encroachment than the preliminary injunction. I think the guidelines are more liberal and in the greater interest of the people than the preliminary injunction is. The only difference is that this happens to be entitled 'Zebra.' That's the fact that we are confronted with at the moment." R.T. at 262-63.
>
> In a discussion with Deputy City Attorney Agnost about the need for an injunction, the court stated:
>
> "MR. AGNOST: Well, the issue before the Court, Your Honor, is whether or not a preliminary injunction should issue at this time.
>
> "THE COURT: I think it should, in the light of the prior history. I don't think that this is . . . . And it does not reflect on the Police Department if it does, because the Police Department has already agreed, not only to do everything that any injunction of the Court would call for, but they have done so before any order of the Court, and they have gone further than any order of the Court; because they have established and are providing adequate guidelines for not only forcible stopping but for any type of approach situation." R.T. at 265-66.

[7] *People v. Moore*, No. 88244 (Super. Ct. Cal. 1976).

ment still is investigating the Zebra murders, or that it is making stops pursuant to Operation Zebra. Under a straightforward application of the case or controversy requirement, the cessation of the mass murders, the termination of Operation Zebra, and the conviction of the Zebra killers appear to have divested the parties of any legally cognizable interest in the constitutional issues engendered by the stops and frisks. Hence, any opinion by this court would seem to be advisory only.

[3] The general principles of mootness contain an important exception, however, which we must address before holding that this appeal is moot. In *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911), the Supreme Court stated that its jurisdiction "ought not to be, as [it] might be, defeated, by short term orders, capable of repetition, yet evading review..." This doctrine has been used frequently in the last 60 years and applies to court orders and injunctions similar to that involved in the instant case. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Carroll v. President and Commissioners*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968).

[4] The first aspect of the repetition/evasion exception involves a determination of the possibility of repetition of the challenged law or conduct. When events have permanently destroyed any possibility of repetition, the case is moot. *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 129, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975); *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). Similarly, when the chance of repetition is remote and speculative, there is no jurisdiction. *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *Hall v. Beals*, 396 U.S. 45, 49, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969). "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 435 U.S. 629, 633, 73 S.Ct. 894, 898,

97 L.Ed. 1303 (1953). This requirement would not be satisfied "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203, 89 S.Ct. 261, 264, 21 L.Ed.2d 344 (1968).

[5] The evasion branch of the test is fulfilled when "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration . . . " *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975). The case should be within a class normally incapable of appellate review because of the lapse of time. *See Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Dunn v. Blumstein,* 405 U.S. 330, 333, n.2, 92 S.Ct. 995, 31 L.Ed.2d. 274 (1972). In making its decision on evasion, a court examines a variety of factors such as the probability that a subsequent suit challenging the action will be brought and the likelihood that it will reach appellate review. *See DeFunis v. Odegaard, supra,* 416 U.S. at 319, 94 S.Ct. 1704.

[6,7] Applying this doctrine to the present case, we hold that the April 25 revised guidelines did not moot this legal action. Even if they did correct constitutional infirmities in the earlier directives, the April 25 guidelines did not end the controversy or divest the district court of the power to grant an injunction. Between April 17 and April 25, police officials issued at least six directives relating to the Zebra program. On this proven record of almost one new order per day, there was no reason for the court to conclude that new, and possibly contradictory, pronouncements might not be issued within the next week. In fact, the guidelines themselves suggested that they could be revised easily, and that the police officers could revert to their prior, allegedly unconstitutional, practices. They provided that they could be "modified or disregarded because of special circumstances" upon Chief Scott's authorization, Defendants' Exhibit E at 7, and the court found that "absent an order of this Court to the contrary, they may be modified or revoked at any time." C.T. at 93. Just as important, there still

existed questions about whether these revised guidelines even corrected the constitutional problems of the earlier directives. Portions of Scott's testimony suggested that the revised guidelines might permit stops on the same challenged basis as the initial directives. R.T. at 290. The district court, moreover, found that the April 25 guidelines continued to permit stops on no more than a determination that the suspect resembled the composite drawings and other physical characteristics of the Zebra killer.

Although these factors do not demonstrate the unconstitutionality of the April 25 guidelines, they do show that the challenged police behavior was very capable of repetition, either through explicit rejection of the new guidelines or by a continuation of criteria used in making earlier stops. "It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants 'would be free to return to "[their] old ways." ' " *Allee v. Medrano,* 416 U.S. 802, 810-11, 94 S.Ct. 2191, 2198, 40 L.Ed.2d 566 (1974) (citations omitted). The defendants have a heavy burden of showing that they will not revive their challenged conduct, and mere disclaimers are not satisfactory. *United States v. W.T. Grant Co., supra,* 345 U.S. at 633, 73 S.Ct. 894. In the present case, so many questionable circumstances existed that this burden was not met.

[8] Even if the March 29, 1976, convictions ended any chance that Operation Zebra would be used again to apprehend more Zebra killers, they did not destroy the possibility of a recurrence of Zebra-like guidelines involving the same challenged conduct and constitutional questions of *Williams v. Alioto.*[8] Scott testified that, presented with another series of

[8] The repetition/evasion exception does not require a repetition of the exact law or behavior. The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur. *See Southern Pacific Terminal Co. v. ICC,* supra, 219 U.S. at 515, 31 S.Ct. 498.

unsolved homicide, "I would probably issue the same order we are talking about now." R.T. at 253. In an effort to show that the Zebra program was not an extraordinary departure from normal procedures, he testified that the Zebra guidelines represented prevailing departmental policy and police behavior, and that "when it comes to matters of law and procedures, would apply to any other case or any other investigation or patrol procedures." R.T. at 255. With the development of techniques ensuring a high degree of accuracy, the use of composite sketches and physical data ranges has become an increasingly familiar aspect of law enforcement efforts, and can be expected to continue.

[9,10] We hold that the convictions and the cessation of the homicides have mooted this appeal, however. A mere speculative possibility of repetition is not sufficient. There must be a cognizable danger, a reasonable expectation, of recurrence for the repetition branch of the mootness exception to be satisfied. We are unable to find this required possibility of repetition. Despite Scott's assurances that the Zebra program represented departmental policy, everyone else involved in the case viewed the program as an extraordinary effort to apprehend a mass murderer. Indeed, the program raised serious constitutional questions justifying an action for declaratory and injunctive relief. The likelihood that such a program will be used in the future is incalculable. Perhaps if the City were confronted with another series of unsolved homicides that frustrated normal investigative techniques, a large-scale program of stops, frisks, and questioning might reappear. As Chief Scott stated, the Police Department might again use Zebra-like guidelines in a similar situation. But the relevant question is: Is this situation likely to arise? Although we can imagine its recurrence, we cannot consider it more than a speculative possibility.

[11] The reasonable likelihood that challenged conduct or laws will recur is not enough to fulfill this segment of the repetition/evasion exception. The disputed action must be

likely to affect again the litigants in the original lawsuit. In class actions, the repetition need occur as to some of either the named or unnamed plaintiffs. *Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). In the present case, even in the remote event that Zebra-like guidelines recurred, it is unlikely that they would burden any of the plaintiffs. Although there are numerous named and unnamed plaintiffs, this number is small as compared to the entire population of San Francisco. It is probable that new guidelines would focus on a new class, such as white males or black females, and thereby make it impossible for the present plaintiffs to be affected by their recurrence.

The Supreme Court has found mootness in factual situations that were equally unlikely to recur. There was mootness in *Hall v. Beals, supra,* 396 U.S. at 49, 90 S.Ct. at 202, where "appellants will face disenfranchisement in Colorado in 1972 only in the unlikely event that they first move out of the State and then re-establish residence there within two months of the presidential election in that year." Similarly, in *Preiser v. Newkirk,* 422 U.S. 395, 95 S.Ct. 233, 45 L.Ed.2d 272 (1975), the Court dismissed a prisoner's action challenging his transfer without hearing or explanation from a medium security prison to a maximum security prison after a showing that he had returned to the medium security prison. The Court found that "[a]ny subjective fear [the plaintiff] might have entertained of being again transferred, under circumstances similar to those alleged in the complaint . . . [is] indeed remote and speculative . . ." *Id.* at 402-03, 95 S.Ct. at 2335.

We have held that a challenge to extraordinary law enforcement actions is moot if the state of emergency has ended, and if both the emergency situation and the allegedly unlawful police actions are extremely unlikely to repeat themselves. In *Halvonik v. Reagan,* 457 F.2d 311 (9th Cir. 1972), the State of California promulgated loitering and assembly regulations in response to several riots and acts of violence that

occurred in the City of Berkeley. Order was soon restored, however, and the disputed regulations were rescinded. The court found that a lawsuit challenging the regulations was moot because of the unlikelihood that comparable turmoil and regulations would occur in the City. *Id.* at 113-14. Similarly, in *Wilson v. Webster,* 467 F.2d 1282 (9th Cir. 1972), the termination of several weeks of campus unrest and the revocation of an ordinance designed to deal with the turmoil mooted a suit against county law enforcement officials. The court found that further campus riots were improbable. See also *Taylor v. McGowan,* 412 F.Supp. 1094 (C.D. Cal. 1975). These decisions suggest that states of emergency and the responses they trigger do not fit readily into the repetition/evasion exception to the mootness doctrine.

[12] Although it is not an explicit part of the repetition/evasion test, the significance of the issue plays an intangible role in determining whether this standard is met. Undoubtedly, the public interest is served by a prompt adjudication of significant constitutional issues. "But purely practical considerations have never been thought to be controlling by themselves on the issue of mootness . . ." *Richardson v. Ramirez,* 418 U.S. 24, 36, 94 S.Ct. 2655, 2662, 41 L.Ed.2d 551 (1974). Concern for the public interest can support the decision to review a case, but it cannot confer jurisdiction. *Sosna v. Iowa, supra,* 419 U.S. at 401 n.9, 95 S.Ct. 553. Whenever the Supreme Court speaks of the public interest as a factor supporting justiciability, it does so only if a dispassionate application of the mootness doctrine confers jurisdiction. *See Super Tire Engineering Co. v. McCorkle, supra,* 416 U.S. at 125-27, 94 S.Ct. 1694; *United States v. W. T. Grant Co., supra,* 345 U.S. at 632-35, 73 S.Ct. 894. In the present case, we have determined that the Article III requirement of a case or controversy is not satisfied. We are unable to create jurisdiction by resort to public policy considerations.

[13] Both prongs of the repetition/evasion standard must be met in order to avoid mootness. Because the likelihood of

repetition is remote and speculative, we need not determine whether the recurrence of Zebra-like guidelines would evade review.

We conclude that this case does not present issued "capable of repetition, yet evading review." Accordingly, we dismiss the appeal as moot and vacate the judgment of the district court. We have no occasion to consider the Fourth Amendment issues raised by the parties.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH B. WILLIAMS, et al., *Plaintiffs,* vs. JOSEPH L. ALIOTO, et al., *Defendants.*	No. C-74-0866-ACW
LEO BAZILE, et al., *Plaintiffs,* vs. JOSEPH L. ALIOTO, et al. *Defendants.*	No. C-74-0867-ACW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an order shortening time for notice of motion, these matters came on for hearing on April 24 and April 25, 1974, on plaintiffs' motions for preliminary injunction. All parties were represented by counsel. Oral and documentary evidence was presented, and the Court considered all affidavits filed by the parties prior to the hearing. The Court has also received and considered memoranda of law and oral argument of all parties.

The Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

FINDINGS OF FACT

(1) The San Francisco Police Department has assigned the letter "Z" and the equivalent symbol "Zebra" to an investigation of a series of homicides and attempted homicides in which twelve persons were killed and six wounded by a gunman or gunmen in the City of San Francisco between early December 1973 and the date of filing of the earliest of these suits on April 19, 1974. In the course of that investigation, the Department issued a series of directives, orders and memoranda between April 17, 1974 and April 22, 1974, that were received in evidence as Plaintiffs' Exhibits P-1 through P-4 and are incorporated herein by reference.

(2) Between April 17, 1974, and April 25, 1974, the defendants have caused officers of the Police Department forcibly to stop more than 600 black male individuals pursuant to the instructions in the documents described by ¶ (1) above. All of these stops were made upon the sole authority of the documents in question, and purportedly pursuant to the procedures set forth in those documents.

(3) Numerous of the individuals stopped were subjected to a "pat-down" form of search and "field interrogation" cards were completed at the scene for future use of the defendants.

(4) The documents described in ¶ (1) together authorized and directed that officers stop black male individuals physically resembling two composite drawings attached to Plaintiffs' Exhibit P-1 and having other general physical characteristics described in Plaintiffs' Exhibits P-1 and P-3, although such individuals exhibited no other characteristics or activities that could lead a reasonable officer to believe that the particular individual had engaged in or was presently engaging in criminal activity. Because the aforesaid composite drawings and physical description are general in nature, police officers have, in applying them, already found more than 600 black male persons who are described by them and, if continued to be used, they would apply to countless additional persons.

(5) Prior to April 23, 1974, neither the documents described in ¶ (1) nor any other written or oral instructions given to officers of the Police Department further limited the class of persons who may be stopped and pat-searched pursuant to the Zebra investigation.

(6) An additional directive issued to the Zebra Command under date of April 23, 1974, limits the class of persons subject to stop to an individual who "is acting, or appears to be, out of the ordinary." That directive has not yet been issued to the larger number of officers of the Department who are subject to the documents described in ¶ (1). The directive in question was admitted as Plaintiffs' Exhibit P-7 and is incorporated herein by reference.

(7) An additional directive was issued under date April 25, 1974, entitled "Revised Zebra Guidelines", purporting to supercede all prior oral and written orders respecting the Zebra investigation. Said order is incorporated herein by reference. Said order was admitted into evidence as Defendants' Exhibit "E". It purports to establish detailed "guidelines" to be followed in conducting the field investigation for the Zebra suspect, including guidelines for forcibly stopping and pat-searching persons in connection with that investigation. The guidelines purport to define the circumstances under which an individual may be forcibly stopped and "pat-searched". Said guidelines were modeled after the "Model Rules for Law Enforcement—Stop and Frisk" of the Project on Law Enforcement Policy and Rulemaking, College of Law, Arizona State University, with significant modifications, among them the deletion, from the enumerated factors which may justify a forcible stop, of the second factor enumerated in the Model Rules, which reads as follows:

> 2 **The Persons' Actions:** Is he running away from an actual or possible crime scene? Is he otherwise behaving in a manner indicating possible criminal conduct? If so, in what way? Were incriminating

statements or conversations overheard? Is he with companions who themselves are "reasonably suspicious"?

Moreover, the guidelines (Section II, at page 3) authorize a forcible stop on no more than a determination that the subject "fit[s] the description of the persons wanted" for the Zebra slayings, which, in the context of the description contained in the guidelines and in the composite drawings previously issued, has the effect of continuing to authorize and direct the forcible stop of large numbers of black male citizens although such persons exhibit no other characteristics or activities that could lead a reasonable officer to believe that a particular individual had engaged in or was presently engaging in criminal activity.

(8) The aforesaid Guidelines dated April 25, 1974, (Defendants' Exhibit "E") by their terms (Section VI, pp. 6-7) permit departure from the procedures described therein upon authorization from the Chief of Police. Moreover, absent an order of this Court to the contrary, they may be modified or revoked at any time.

(9) Defendants are in possession of no information consisting of characteristics or attributes of the Zebra killer which would enable them to formulate questions designed to be put to persons forcibly stopped in the manner described in Defendants' Exhibit "E" which would enable them to determine whether the persons stopped are or might be the Zebra killer, and they have not attempted to do so.

(10) The stops and searches conducted pursuant to the Zebra operation between April 17 and April 24, 1974, have been found by the Police Department, and are found by this Court, to have been ineffective and unproductive in the search for the Zebra killer. They have not uncovered any affirmative investigative leads to the identity or whereabouts of the killer or the nature or circumstances of the killings. The proposed searches conducted under the modified procedures inaugurated

by the directive of April 25, 1974, Defendants' Exhibit "E", to the extent directed against persons upon no greater cause than a resemblance to the general physical characteristics described therein and the previously circulated composite drawings, are likely to be similarly unproductive and ineffective.

(11) Defendants, their agents and employees, are public officials and officers, acting under color of the laws of the State of California.

(12) Unless restrained by order of this Court, defendants intend to continue, and will continue, their program of stopping and pat-searching persons pursuant to the Zebra investigation, in the manner in which such stops and pat-searches have heretofore been conducted, subject only to the modifications of procedure described in Defendants' Exhibit "E". Under these procedures, as modified, hundreds of black male individuals will be subjected to stops and pat-searches solely on the basis of their general physical resemblance to the descriptions of the Zebra killer set forth in Defendants' Exhibit "E" and to the composite drawings attached to Plaintiffs' Exhibit P-1.

CONCLUSIONS OF LAW

(1) The forcible stoppings of individuals upon the ground of resemblance to the suspect described in Plaintiffs' Exhibits P-1 and P-3 and portrayed in the composite drawings attached to Plaintiffs' Exhibit P-1, without additional reliable evidence which, judged objectively, presents sufficient indicia of reliability to warrant a reasonable police officer in concluding that the particular individual stopped has committed or is committing a criminal offense, violates the Fourth and Fourteenth Amendments to the Constitution of the United States. *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Adams v. Williams,* 407 U.S. 143, 147 (1972).

(2) The modifications of the procedures effected by Defendants' Exhibit "E", to the extent that they continue to authorize and direct the forcible stop of large numbers of black

male persons who fit the general description contained therein and in the aforesaid composite drawings without additional reliable evidence, which, judged objectively, presents sufficient indicia of reliability to warrant a police officer in concluding that the particular individual stopped has committed or is committing a criminal offense, violates the Fourth and Fourteenth Amendments to the Constitution of the United States. *Terry v. Ohio, supra; Adams v. Williams, supra.*

(3) The pat-down searches of persons stopped on the grounds set forth in the preceding two paragraphs violate the Fourth and Fourteenth Amendments because:

(a) the stoppings are unconstitutional, as found in paragraphs (1) and (2) above; and

(b) the pat-down searches are made without reasonable grounds to believe that the particular person patted down is armed and dangerous. *Terry v. Ohio,* 392 U.S.1, 22-24 (1968); *Sibron v. New York,* 392 U.S. 40, 65-66 (1968); *Adams v. Williams,* 407 U.S. 143, 146 (1972).

(4) The stop procedure and the pat-down search procedure conducted by defendants between April 17 and April 24, 1974, pursuant to the Zebra investigation and purportedly pursuant to the guidelines set forth in Plaintiffs' Exhibits P-1 through P-4 have deprived the plaintiffs and the class they represent of rights, privileges and immunities secured by the Constitution of the United States, namely the Fourth and Fourteenth Amendments thereto.

(5) The finding made in paragraphs (1) through (4) above would warrant and require injunctive relief by this Court even if the modified procedures prescribed by the directive of April 25, 1974, Defendants' Exhibit "E," were constitutional. *Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966).

(6) For the reasons stated in Paragraphs (2) and (3) above, the modified procedures prescribed by the directive of April 25, 1974, Defendants Exhibit "E," are not constitutional;

and their enforcement by the defendants will deprive plaintiffs and the class they represent of rights, privileges and immunities secured by the Fourth and Fourteenth Amendments to the Constitution of the United States.

(7) In the absence of "constitutionally adequate, reasonable grounds for doing so" (*Sibron v. New York,* 392 U.S. 40 64 (1968)), the practices and proposed practices of stopping individuals and conducting pat-down searches of them described in the foregoing paragraphs also have deprived and will deprive plaintiffs and the class they represent of rights, privileges and immunities secured by the First and Fourteenth Amendments, specifically the rights of freedom of movement and of freedom from the unreasonable and arbitrary dictates of police officers on the public streets. *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965); *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

(8) Any of the more than 600 persons who were heretofore stopped and "pat-searched" on grounds no greater than those described in paragraph (1) above were stopped and "pat-searched" unlawfully, and the records or information derived therefrom are the products of an unlawful "search and seizure"; the continued maintenance and use of such records and information by defendants is unlawful. *Terry v. Ohio, supra; Adams v. Williams, supra.*

(9) An actual controversy has arisen and now exists between the plaintiffs and the class they represent, on the one hand, and the defendants, on the other, regarding the rights of the plaintiffs declared in paragraphs (1) - (8) above. A determination by this Court is necessary and proper to resolve that controversy.

(10) Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs complained of herein. Suit for declaratory judgment and injunctive relief is their only means of securing redress from defendants' unlawful conduct. Plaintiffs and the class they

represent are now suffering and will continue to suffer irreparable injury from defendants' acts and conduct as heretofore found in these FINDINGS OF FACT and CONCLUSIONS OF LAW. Injunctive relief is therefore necessary and proper.

(11) Nos. C-74-0866-ACW and C-74-0867-ACW raise identical issues of fact and law. The defendants in both actions are substantially identical, and the plaintiff classes are identical. It is appropriate that the two actions be consolidated for disposition.

(12) The class of persons represented by the plaintiffs (as described in paragraph II of the Complaint in No. C-74-0866-ACW and in paragraph III of the Complaint in No. C-74-0867-ACW) is so numerous that joinder of all persons is impracticable. There are questions of law and fact common to the class, and the claims and defenses are typical of those of the class. Plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

(13) Plaintiffs have, by instituting and prosecuting these lawsuits, benefitted the plaintiff class and the public generally in bringing about a conformance with the fundamental requirements of the United States Constitution deemed precious and vital to a society which respects human dignity and the rule of law. Accordingly, this is an appropriate case for the award of reasonable attorneys' fees, to be fixed by this Court upon application by Plaintiffs. *Brandenberger v. Thompson,* ___ F.2d ___ No. 72-2224 (9th Cir. March 25, 1974).

DATED: April 25, 1974

/s/ ALFONSO J. ZIRPOLI
United States District Judge

PRELIMINARY INJUNCTION

This matter having regularly come on for hearing on plaintiffs' motion for preliminary injunction on April 24 and 25, 1974, both parties having been represented by counsel, evidence both oral and documentary having been presented and the matter having been submitted for decision.

IT IS HEREBY ORDERED THAT:

Defendants, their agents, employees, associates, and all persons acting at their direction or in concert with them, are hereby enjoined from doing or causing, directly or indirectly, any of the following in connection with the investigation of the so-called "Zebra" matter:

1) Forcibly stopping on the street any person on the ground that such person appears to be within the so-called "profile" of the suspected "Zebra" killer contained in the Interdepartmental Memorandum dated April 17, 1974, issued by Captain Jeremiah P. Taylor, the composite drawing attached thereto, the additional "Zebra 'Stop and Frisk' Guidelines" issued by Chief Donald M. Scott on April 19 and 22, 1974, or a directive issued by Captain Barca on April 23, 1974, and guidelines issued by Chief Scott on April 25, 1974, or any subsequent orders supplementing or modifying said "profile," unless other independent evidence (such as the conduct of the subject) known to the officer creates a reasonable suspicion that such person has committed or is committing a crime.

2) Pat-searching, "frisking," or otherwise searching any person on the ground that such person appears to be within the so-called "Profile" referred to in paragraph 1 above unless other independent evidence known to the officer creates a reasonable suspicion that such person has committed or is committing a crime and that such person is armed and dangerous.

3) Arresting any person, or forcibly requiring any person to go to a police station, or any place removed from the place of initial contact unless evidence known to the officer establishes probable cause to believe that such person has committed a crime.

4) Preparing or retaining a Field Identification (Interrogation) Card, or other like record, of any stop or search made in violation of paragraphs 1 or 2 hereof after the effective date of this Order.

5) Retaining any Field Identification (Interrogation) Card, or any like record, heretofore made in connection with the above-mentioned investigation, or any information taken or derived therefrom, after the expiration of sixty (60) days herefrom or using, at any time, any such card or information derived therefrom for any purpose other than in connection with the so-called "Zebra" investigation; provided, that any party may apply for an extension of time for retention on a showing that there exists a legitimate law enforcement purpose for continued retention.

DATED: April 25, 1974

/s/ ALFONSO J. ZIRPOLI
United States District Judge